Court of Appeals No. 43897-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

JOHN P. HYNDS and ELISA HYNDS,

Respondents,

v.

EMMA M. SCHMID: TRUSTEE OF THE SCHMID LIVING TRUST DATED APRIL 18, 1989; GENERAL PARTNER OF THE SCHMID LIVING PARTNERSHIP - II; and MANAGER OF SCHMID CR, LLC,

Appellants.

BRIEF OF RESPONDENTS

AND MOTION ON THE MERITS

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I. INTRODUCTION

This appeal concerns the ownership of riparian lands which accreted to respondents' residential lot upon recession of the Columbia, a navigable river. Respondents' lot was subdivided in April 1991, from lands patented prior to statehood. The short plat boundary is coextensive with the ordinary high water mark, noted at an elevation of 19.5 feet. The appellants are the immediate and related successors to the developer, who allege ownership of accreted lands located between the 19.5-foot ordinary high water elevation on the date of platting, and current elevation estimated at 7.9 feet.

* * *

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Does a subdivision plat which notes the elevation of a boundary as coextensive with the ordinary high water mark of a navigable river create a remainder, and result in retention of emergent lands by the developer, if the water level recedes and accretes upland after the plat is recorded? (Appellants' Assignments of Error 1, 2, 4, and 5.)

ISSUE 2: Did the trial court err in granting summary judgment where all issues are controlled by established rules of law regardless of the developer's intent? (Appellants' Assignments of Error 1, 2 and 3.)

III. STATEMENT OF THE CASE

The Richard Ough Donation Land Claim, which included the property in dispute, described its subject by "Certificate numbered one hundred and eight of the Register and Receiver at Vancouver, Washington Territory," filed in the General Land Office of the United States;[1] and by metes and bounds, but without reference to Columbia River, its water or meanders. Said patent was recorded February 14, 1885 in Book U, at page 84, records of Clark County, Washington. *CP 138-39.* Later the same day, patentee Betsy Ough conveyed her interest in a portion of the property to co-patentee Richard Ough, using a description with an exception that called out the "low water mark on the right bank of the Columbia River." [2] Said conveyance was recorded in Book V, at page 455, records of Clark County Washington. *CP 140-41.*

Emma Schmid and her husband, George J. Schmid (deceased), acquired a portion of Ough DLC, including the disputed parcel: (i) from Vincent H. Hunter and Priscilla A. Hunter under a *Warranty Deed* dated

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[1]A search of historical records failed to yield said certificate.

[2]The Columbia River flows from east to west in the location of the property, which is on the right (north) bank as one travels downstream.

October 27, 1977, filed for record at Clark County Auditor's File No. (AFN) 7711070116, *CP 57-58*; and (ii) from Rhonda Palmer as Guardian of the Person and Estate of H. Robert Cole under a *Deed* dated October 6, 1983, filed for record at AFN 8310070140, *CP 59-60*. Both deeds conveyed "to the meander line of the Columbia River." *Id.*

On April 24, 1991, a Short Plat was filed on behalf of George Schmid, in Book 2 of Short Plats, at page 543, records of Clark County ("SP 2-543"). *CP 61*. The plat depicted its southern boundary with the following note:

> LINE OF ORDINARY
> HIGH WATER
> ELEVATION 19.5'

The *Dedication*, on the other hand, described the platted property as extending "to the line of ordinary high water of the Columbia River," without stating the elevation (AFN 9104240241). *CP 62-63*.

Lot 1, SP 2-543 was conveyed to James and Jolette Schmid on June 20, 1991, by "lot and block" description, under a *Quit Claim Deed* filed for record at AFN 9106200219. *CP 56*. James and Jolette Schmid conveyed Lot 1 to the John and Elisha Hynds (respondents herein) on October 5, 1998, under a *Statutory Warranty Deed* filed for record at AFN 3018847. *CP 55*.

The Schmid/Hynds' deed described the conveyance as subject, *inter alia*, to:

> Rights of the State of Washington in and to that portion, if any, of the land herein described which lies below the line of ordinary high water of the Columbia River. . . . Any change in the boundary or legal description of the land or title to the estate insured, that may arise due to the shifting and changing in the course of the Columbia River. . . .

CP 55.

On February 9, 2007, the Schmid Family Limited Partnership - II conveyed its remainder to defendant Schmid CR, LLC, in a residue deed describing: (i) Lot 2, SP 2-543 as "Parcel I;" (ii) Lot 3, SP 2-543 as "Parcel II;" and (iii) undeveloped lands lying east as "Parcel III." *CP 68-71.* Peculiar to Parcel III were two sub-parcels "A" and "B," and the following addition, indented as part of the description for Parcel III:

> TOGETHER WITH all tidelands and/or shore land appurtenant to the above described tracts.

CP 71.

On June 25, 2012, Denise Wilhelm, Rivers District Land Manager, Dept of Natural Resources, wrote to county and city employees as follows:

> DNR's survey dept. reviewed the Aerial of the property in question (see attached aerial pdf) and found that it appears State-owned aquatic lands were 'filled' during a period between 1974 and 2011. Those State-owned aquatic lands are still State-owned. . . .

> One of DNR's concerns is the wording in the 2007 quit claim deed that was recorded in 2007 by the Schmid Family. This quit claim included "Together with all tidelands, and/or shore land appurtenant to the above described tracts" (reference 2007 quit claim deed attached). DNR has no record of sale of tidelands at this location, so disputes this claim. DNR is also concerned that this developer/upland owner is preparing to sell and/or develop land that is not owned by them, but by DNR.

CP 127, 129, 130-33.

Correction of factual misstatements

Appellants allege that "[t]he meander line of the Columbia River . . . served as the stated boundary for the Lot 1 property until Short Plat 2-543 was recorded." *Appellant's' Brief* at 5. Contrary to appellants' allegation, the meander line of the Columbia River never served as any kind of boundary because it was never included in the chain of title. *Infra.*

Appellants allege that "Short Plat 2-543 subdivided four parcels of real property: Lots 1 through 3 and a remainder lot known as Tax Lot 214 in the southeast corner of the subdivision." *Appellants' Brief* at 5. Contrary to appellants' allegation, Tax Lot 214 was clearly excluded from the subdivision (heavy black line shown in the southeast corner of the SP 2-543), and was expressly created "BY BOUNDARY LINE ADJUSTMENT," which must have occurred prior to SP 2-543 in order to be noted thereon. *CP 61.*

Paragraphs 9 and 10 of *Appellants' Brief* are comprised of statements regarding the intent of George Schmid, the developer of SP 2-543. *CP 61* ("Filed for record . . . at the request of George Schmid"). The *Deadman Statute* prevents Emma Schmid from testifying regarding the intent of her deceased husband. RCW 5.60.030. Moreover, these allegations are supported only by a self-serving declaration of Emma Schmidt, objected to at trial court, which is inadmissible or must accorded no weight. *Infra.*

Appellants allege that "[r]eal property currently exists between the express southern boundary of Lot 1 and the ordinary high water line of the Columbia River." *Appellants' Brief* at 7. This is not a factual statement, but a conclusion of law addressed *infra.* Moreover, appellants' citations provide no support for this allegation because: (i) *CP 100-01* is the declaration of Timothy J. Calderbank, appellants' counsel, which merely attaches title documents; and (ii) *CP 120-21* is an e-mail from Mitch Kneipp, Interim Community Development Director, City of Washougal, which notes that "the city was unaware of a property in this location," and indicates that the County GIS (mapping) system shows no upland at the location alleged. *CP 120.* As discussed above, the determination of Denise Wilhelm, Rivers District Land Manager, DNR, contradicts appellants' allegation. *CP 127.*

IV. SUMMARY OF ARGUMENT

Respondents Hynds' motion on the merits should be granted dismissing the present appeal, and/or summary judgment should be affirmed, because the appellants failed to carry their burden of showing a genuine issue of material fact after the Hynds demonstrated that they are entitled to summary judgment as a matter of law. The issues in the present case are clearly controlled by settled law: (i) that patents issued prior to statehood convey to the ordinary high water mark of navigable rivers; (ii) that plats which depict no intervening uplands convey to ordinary high water mark, (iii) that the ordinary high water mark shifts with the natural and gradual erosion and accretion of the river, (iv) that ambiguities in plats are resolved against the dedicator, and (v) that courses and distances yield to natural and ascertainable monuments including rivers. The responding *Affidavit of Emma Schmid* is inadmissible: (a) under RCW 5.60.030 because the plat was filed solely on behalf of her now deceased husband, George Schmid; (b) under cases governing plat interpretation which preclude evidence of a party's unilateral or subjective intent; and (c) under CR 56(e) which requires specific facts that rebut the moving party's contentions and disclose genuine issues of material fact.

V. ARGUMENT

Standard of review

Appellate review of summary judgment, is *de novo*. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

* * *

ISSUE 1: Does a subdivision plat which notes the elevation of a boundary as coextensive with the ordinary high water mark of a navigable river create a remainder, and result in retention of emergent lands by the developer, if the water level recedes and accretes upland after the plat is recorded? (Assignments of Error 1, 2, 4, and 5.)

The foregoing issue is resolved by established precedent. In *Smith Tug & Barge v. Columbia-Pacific Towing*, the Washington Supreme Court articulated rules governing the boundaries of tracts bordering navigable rivers based upon whether the respective patents dated before, or after, statehood:

> First: meander lines are not boundaries of tracts of federal lands patented prior to statehood. Insofar as such lands border on navigable rivers, meander lines were run for the purpose of defining the sinuosities of the banks of the river, and as a means of ascertaining the quantity of land. The watercourse itself, however, provides the actual boundary.... Second: the line of ordinary high water is the boundary of federal lands patented prior to statehood, if they abut navigable rivers. Third: such boundary shifts with the natural

> and gradual erosion and accretion of the river. Although one may lose his land by gradual natural erosion, he is entitled to the addition caused by natural accretion. . . . Insofar as *Washougal & LaCamas Transp. Co. v. Dalles, Portland & Astoria Nav. Co.*, 27 Wash. 490, 68 P. 74 (1902), is inconsistent with these principles, it is overruled.

Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 78 Wash.2d 975, 982-83, 482 P.2d 769 (1971); citing *Ghione v. State*, 26 Wash.2d 635, 175 P.2d 955 (1946); and *Railroad Co. v. Schurmeir*, 74 U.S. (7 Wall.) 272, 19 L.Ed. 74 (1868). This rule was applied by the Court of Appeals in 2003:

> Here, Lots 4 and 5, which abut Kindred Slough, were originally transferred by a federal patent before statehood. Thus, there are two possible boundary lines, depending on whether Kindred Slough is a river: (1) if Kindred Slough is a navigable river, the boundary is the line of ordinary high water . . . ; or (2) if Kindred Slough is navigable water but not a river, the boundary is either the ordinary high-water line or the meander line, whichever is farther; here it appears that the meander line is farther.

Larson v. Nelson, 77 P.3d 671, 676, 118 Wash. App. 797 (2003).

In 1971, the Court of Appeals articulated a related rule, holding that plats which depict no intervening uplands evidence an intent to convey to the shoreline, interpreted as the "ordinary high watermark:"

> When a plat indicates on its face that lots within its boundaries extend to the shoreline as one of its boundaries, there is a clear intention of the dedicator to include within the plat all upland to the shoreline."

Wilson v. Howard, 5 Wash.App. 169, 176, 486 P.2d 1172, *review denied*, 79 Wash.2d 1011 (1971); citing *Frye v. King County*, which held as follows:

> As to all of the land included in Lots 1 and 2 of section 34, the same being the upland purchased by the Seaboard Security Company, . . . we think that an examination of the plat, purporting, as it does on the map itself, to make lots and blocks extending to the shore line, shows a clear intention to include within the plat all of such land.

Frye v. King County, 151 Wash. 179, 186-87, 275 P. 547, 549-50 (1929). In 1952, the Washington Supreme Court applied this rule to a description purporting to convey to the meander line:

> It may be stated as a general rule that a deed conveying land by a description which employs a meander line as a boundary will be construed against the grantor, and, if he owns to the water, he will be deemed not to have intended to cut off his grantee from the water. The rule, of course, is subject to the qualification that if the parties to the deed appear to have intended that the meander line should be the actual boundary, then such intention will be given effect.

Harris v. Swart Mortgage, 41 Wash.2d 354, 361, 249 P.2d 403 (1952).

Applying the foregoing rules, there is no interpretation of the evidence that could result in the reversal of summary judgment. The parent parcel was patented by Richard and Betsey Ough on February 14, 1885, four years prior to statehood (1889). *CP 136-39*. "[T]he line of ordinary high water is the boundary of federal lands patented prior to statehood, if they abut navigable

rivers." *Smith Tug & Barge*, 78 Wash.2d at 983. There is no question that the Columbia is a navigable river. It is not necessary to construe the intent of subsequent grantors because the Ough Patent did not include lands waterward of the ordinary high water mark. Hence, such lands were never within the chain of title, and subsequent grantors could not convey what they did not own.

Although the appellants did not differentiate at trial court, they now argue that the disputed strip is located *not* between the ordinary high water mark and meander line, but between the ordinary high water mark memorialized in SP 2-543 (19.5 feet above sea level) *CP 61*, and the ordinary high water mark at its current elevation, estimated by Cindy A. Halcumb, Professional Land Surveyor, as 7.9 feet above sea level on May 9, 2012. *CP 51.* This argument would allow developers to retain land between riparian lots and the adjacent river simply by surveying and memorializing the elevation of the ordinary high water mark, and waiting for the water to recede and accrete uplands. There is no purpose for retaining such "reserve strips" other than charging for river frontage a second time. In the present case, the Hynds property was marketed as "RIVER FRONT LUXURY" property, with "generous river front decks." *CP 30-31.*

Fortunately, rules adopted in above-cited decisions prohibit such schemes of bait and switch. Under *Smith Tug & Barge*, the deed boundary is the line of ordinary high water, which accretes and erodes with the river. *Smith Tug & Barge*, 78 Wash.2d at 982-83. The appellants (and their predecessors) owned nothing waterward of the ordinary high water mark; hence, they owned no remainder to convey nor retain. The fact that they surveyed the elevation at 19.5 feet, "tied" the boundary on SP 2-543, and noted Lot 1 as .47 acres, does not leave the appellants any remainder to which river deposits could accrete. Because the platted to the line of ordinary high water, the appellants conveyed all they owned, and any tidelands located waterward of that line belong to the State of Washington. *CP 127*. Any lands which accreted after platting became part and parcel with the platted lots, and transferred to the grantees thereof.

Moreover, the *Frye* - *Wilson* line of authority holds that plats which depict no intervening uplands evidence an intent to convey to the shoreline, interpreted as the "ordinary high watermark." *Frye*, 151 Wash. at 186-87; *Wilson*, 5 Wash.App. at 176. In the present case, SP 2-543 clearly depicts the lots as extending to the shoreline of the Columbia River, with no reservation of uplands intervening. *CP 61*.

The appellants rely, exclusively, upon a caveat in *Harris* that the general rule "is subject to the qualification that if the parties to the deed appear to have intended that the meander line should be the actual boundary, then such intention will be given effect." *Harris*, 41 Wash.2d at 361. The appellants argue that the 19.5-foot elevation, and .47 acres in Lot 1, at time of platting, should control over subsequent elevations and accreted acreage. This argument is misdirected in assuming that the 19.5-foot elevation, and .47 acres, remain static while the Columbia River recedes to accrete additional uplands, contrary not only to the above-cited authorities, but to rules governing the interpretation of plats and surveys, as follows:

> Not only is it clear that the dedicators intended that the platted property extend to the line of high tide but the applicable rule of law calls for the same result. Courses and distances yield to natural and ascertained objects.

Camping Commission of Pac. Northwest Conference of Methodist Church v. Ocean View Land, Inc., 421 P.2d 1021, 1022-23, 70 Wash.2d 12 (1966); accord *State ex. rel. Davis v. Superior Court*, 84 Wash.252, 257, 146 P. 609 (1915) ("A call for a natural object, such as a river, will control against course and distance.") Water elevation in Short Plat 2-543 is merely the *distance* above sea level, the actual location of the Columbia River controls.

Appellants argue that intent to retain tidelands is evidenced by the following language, indented and without spacing to separate it from the description of Parcel III in a *Statutory Quit Claim Deed* dated February 9, 2007, under which Schmid Family Limited Partnership - II conveyed its remainder (residue) to Schmid CR, LLC:

> TOGETHER WITH all tidelands and/or shore land appurtenant to the above described tracts.

CP 68, 71. As noted above, the grantor would have to *own* the tidelands in order to convey them; however, we address this argument based the appellants' counter-factual assumption.

The 2007-Deed conveyed the Schmid remainder without mention of any upland between the Hynds property and the Columbia River. *CP 68-71.* Parcel I in the 2007-Deed is Lot 2, SP 2-543; and Parcel II is Lot 3, SP 2-543. The only mention of "tidelands and/or shoreland" is associated with the description of "Parcel III." *CP 71.* The record includes a survey drawing prepared and certified by Brian P. Tandy, Professional Land Surveyor, which depicts all of the property included in the description of Parcel III (APN 4321322) as lying east of a southerly extension of the centerline of 11th Street. *CP 165.* The affidavit also includes an Assessor's Parcel Map

which reveals that SP 2-543 lies entirely west of the southerly extension of said centerline. *CP 166.* Hence, the 2007-Deed does not describe any land waterward of SP 2-543, let alone Lot 1 thereof (the Hynds property).

Moreover, the appellants fail to advise the court that *Harris* interpreted a deeded boundary defined by "the meander line of the left bank of the Columbia River as the same is established by the U.S. Land Office plat . . . ," and the Supreme Court held as follows:

> We readily concede that the reference in the Timmerman-Scott deed to the meander line as established by the U. S. Land Office plat is indicative of an intention that the meander line should be the actual boundary. Another indication is the failure of Timmerman to except from the grant the county road, which lies largely southwest of the meander line.
>
> Despite these indications of an intention that the meander line should be the actual boundary, we believe that convincing evidence is furnished by the Timmerman-Patterson residue deed that Timmerman intended that his grant to Scott should extend to the high water line of the river.
>
> From the residue which he granted to Patterson in 1924, Timmerman excepted not his own deed to Scott, but Scott's deed to Brown. Included within Scott's deed to Brown were the shorelands. It is only reasonable to conclude that, by specifically excepting Scott's grant of the uplands and shorelands from his own conveyance of the residue, Timmerman recognized and confirmed that he had parted with title to the land lying between the uplands and shorelands.

Harris v. Swart Mortgage, 41 Wash.2d 354, 357, 362, 249 P.2d 403 (1952).

If an exception in a "residue deed" was sufficient, in *Harris*, to overcome an apparent intention to convey to a meander line referenced in U.S. Land Office datum, then failure to include any remainder appurtenant to Lot 1, SP 2-543 in the 2007-Schmid Deed clearly overcomes a reference to "tidelands and/or shore land" which is not tied to survey datum of any kind. The appellants would ask the Court to accept this vague reference, limited by its association with Parcel III, as somehow retaining ownership of tidelands located waterward of the Hynds property, even though "Lot 1, 2-543" is not even mentioned in the 2007-Deed. Neither *Harris*, nor any other case, would support such a conclusion.

Moreover, SP 2-543 shows no waterward reservation whatsoever. We submit that, in order to take advantage of the "qualification" in *Harris*, the deed must include an *express* reservation, not merely incorporate a plat which notes a boundary elevation that could move by accretion or erosion. This point is emphasized by failure of the actual *Dedication* of SP 2-543 to recite the 19.5-foot elevation in question. *CP 62-64.* Hence, Olson Engineering, Inc., the Professional Land Surveyor that prepared the plat, merely followed the requirements of the Washington Administrative Code:

> The following requirements apply to . . . plats, short plats, . . . and binding site plans required by law to be filed or recorded with the county. . . .
>
> (b) They shall contain: . . .
>
> (ii) The vertical datum when topography or elevations are shown; . . .
>
> (v) Distances in feet and decimals of feet;

WAC 332-130-050. Adherence to rules of survey evidences professionalism on the part of the surveyor, not intent on the part of the developer.

Appellants' focus upon a note of ".47 acres" comprising Lot 1, SP 2-543, is misdirected under holding of the Washington Court of Appeals in *Erickson v. Wick*, 22 Wash.App. 433, 591 P.2d 804 (1979). The dispute in *Erickson* devolved upon the choice of survey techniques and the location of a meander line called out as the southern boundary of Wick's property. If modern survey techniques were adopted, Wick's property would not close at the meander line, but would extend south to include ownership of a six-acre parcel otherwise owned by Erickson. After determining that it would fulfill the intent of the plat to close Wick's lot at the point where the meander line most closely approached the boundary in question, the Court addressed Wick's argument that stated acreage of the lots should control:

> The general rule is that, while it may be considered, the designated quantity of land called for is the least reliable of all descriptive particulars and the last to be resorted to.

Erickson, 22 Wash.App. at 437-38. Likewise, in the present case, the accreted ordinary high water mark controls over stated acreage.

* * *

ISSUE 2: Did the trial court err in granting summary judgment where all issues are controlled by established rules of law regardless of the developer's intent? (Assignments of Error 1, 2 and 3.)

Summary judgment

The function of summary judgment is to avoid useless trials. *Hudesman v. Foley*, 73 Wash.2d 880, 886, 441 P.2d 532 (1968). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or part. *Samis Land Co. v. City of Soap Lake,* 143 Wash.2d 798, 803, 23 P.3d 477 (2001).

Where the moving party demonstrates that it is entitled to judgment as a matter of law, the non-moving party must present evidence showing a

genuine issue of material fact. *Hash v. Children's Orthopedic Hospital & Medical Center*, 110 Wash.2d 912, 915, 757 P.2d 507 (1988). A nonmoving party may not rely upon argumentative assertions nor affidavits considered at face value, but must set forth specific facts that rebut the moving party's contentions and disclose genuine issues of material fact. *Twelker v. Shannon & Wilson, Inc.*, 88 Wash.2d 473, 479, 564 P.2d 1131 (1977); *Boardman v. Dorsette,* 381 Wash.App. 338, 340, 685 P.2d 615, *rev. denied*, 103 Wash.2d.1006 (1984); CR56(e). A motion for summary judgment should be granted where reasonable persons could reach only one conclusion. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998); *Greater Harbor 2000 v. City of Seattle*, 132 Wash.2d 267, 279, 937 P.2d 1082 (1997).

In the present case, summary judgment was appropriate because the outcome is determined by rules of law, irrespective of the only "issue of fact" raised by the appellants: developer's intent. The developer's intent to reserve land that transferred to the Hynds by rule of law is irrelevant to the case.

Appellant's testimony

At hearing on summary judgment, the Hynds objected to appellants proffer of inadmissible evidence regarding subjective intent relating to SP 2-543 and conveyance of Lot 1. Emma Schmid cannot testify, under

RCW 5.60.030, to the intent of her now deceased husband, George Schmid, the sole developer of SP 2-543. *CP 61* (SP 2-543 was "[f]iled for record . . . at the request of George Schmid"). Nor can she testify regarding subjective intent behind the filing of SP 2-543.

The Washington *Deadman's Statute* prohibits testimony regarding transactions or conversations with deceased persons in actions involving title derived from such persons:

> [I]n an action or proceeding where the adverse party sues or defends as . . . deriving right or title by, through or from any deceased person . . . , a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person . . .

RCW 5.60.030. The *Deadman's Statute* bars testimony of "interested persons," including witnesses who stand to gain or lose as a direct result of the judgment. *Marriage of Himes*, 136 Wash.2d 707, 729, 965 P.2d 1087 (1998).

The *Deadman's Statute* applies in the present case because the Hynds allege title which is ultimately derived from the plat dedicator, George Schmid. Emma Schmid is clearly an interested person because she stands to gain ownership of lands which have accreted to the Hynds' property.

The term "transaction" in the *Deadman's Statute* "means doing or performing some business or management of any affair." *Estate of Shaughnessy*, 97 Wash.2d 652, 656, 648 P.2d 427 (1982). In the present case, subdivision and sale involve the business and management of real property. If he were alive, George Schmid could contradict the testimony. *Id.* Hence, George's widow, Emma Schmid, is not permitted to testify regarding his intent in recording SP 2-543.

The rule governing plat interpretation, adopted by the Supreme Court in 1929, has never varied:

> The first essential of a dedication is the intention of the owner of the land to dedicate it, and such intention is usually shown by the plat. **The contrary intention cannot be shown by something hidden in the mind of the land owner.**

Frye v. King County, 151 Wash. 179, 182-83, 275 P. 547, 548 (1929), emphasis added.

In addition, the Court has adopted a presumption *against* the developer's stated intent, noting "the law is settled that, in the interpretation of maps and plats, all doubt as to the intention of the owner or maker should be resolved against him." *Tsubota v. Gunkel*, 58 Wash.2d 586, 590, 364 P.2d 549 (1961); citing *Gwinn v. Cleaver*, 354 P.2d 913, 915, 56 Wash.2d 612

(1960); and *Mathews v. Parker*, 163 Wash. 10, 299 P. 354 (1931).

The Court of Appeals has articulated rules governing the resolution of ambiguities in subdivision plats:

> If the plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence. . . . When a plat is ambiguous, "surrounding circumstances may be considered to determine [the developer's] intention." . . . "A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning."

Selby v. Knudson, 77 Wash.App. 189, 194-95, 890 P.2d 514 (1995); citing *Olson Land Co. v. Seattle*, 76 Wash. 142, 145, 136 P. 118 (1913); *Roeder Co. v. Burlington Northern, Inc.*, 105 Wash.2d 269, 273, 714 P.2d 1170 (1986); *Deaver v. Walla Walla Cy*, 30 Wash.App. 97, 633 P.2d 90 (1981); and *Brust v. McDonald's Corp.*, 34 Wash.App. 199, 207, 660 P.2d 320 (1983).

In *Hollis v. Garwall*, the Court articulated rules governing the interpretation of *intent* as follows:

> Under Berg and cases interpreting Berg, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written). However, admissible extrinsic evidence does not include:

> Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; . . .

Hollis v. Garwall, Inc., 974 P.2d 836, 843, 137 Wash.2d 683 (1999).

Finally, in opposing summary judgment, the nonmoving party may not rely upon argumentative assertions nor affidavits considered at face value, but must set forth specific facts that rebut the moving party's contentions and disclose genuine issues of material fact. *Twelker*, 88 Wash.2d at 479; CR56(e). Emma Schmid's declaration sets forth no specific facts, only argumentative assertions of intent offered at face value. Hence, based either upon RCW 5.60.030, cases governing plat interpretation or CR 56(e), Emma Schmid's self serving statements of subjective intent were properly excluded or accorded no weight.

* * *

VI. MOTION ON THE MERITS & CONCLUSION

The Rules of Appellate Procedure provide for affirmation of Superior Court decisions where the appeal is determined to be clearly without merit:

> In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court . . .

RAP 18.14(e)(1). The issues in the present case are clearly controlled by settled law: (i) that patents issued prior to statehood convey to the ordinary high water mark of navigable rivers; (ii) that plats which depict no intervening uplands convey to ordinary high watermark, (iii) that the ordinary high water mark shifts with the natural and gradual erosion and accretion of the river, (iv) that ambiguities in plats are resolved against the dedicator, and (v) that courses and distances yield to natural and ascertainable monuments including rivers. The Hynds move on the merits for dismissal of the present appeal, and/or a seek a decision affirming summary judgment, because the present appeal is clearly without merit. The appellants failed to carry their burden of showing a genuine issue of material fact after the Hynds demonstrated that they are entitled to summary judgment as a matter of law.

* * *

RESPECTFULLY SUBMITTED this 18th day of January, 2013.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the plaintiff/respondents Hynds

By: _____
Mark A. Erikson, WSBA #23106

CERTIFICATE OF SERVICE

I certify that on the 18th day of January, 2013, I caused a true and correct copy of this *Brief of Respondents and Motion on the Merits* to be served on the following in the manner indicated below:

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( ) E-mail, as agreed by recipient

By: Kris Eklove
Kris Eklove

APPENDIX 1

RCW 5.60.030
Not excluded on grounds of interest — Exception — Transaction with person since deceased.

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

[1977 ex.s. c 80 § 3; 1927 c 84 § 1; Code 1881 § 389; 1877 p 85 § 391; 1873 p 106 § 382; 1869 p 183 § 384; 1867 p 88 § 1; 1854 p 186 § 290; RRS § 1211.]

Notes:

Purpose -- Intent -- Severability -- 1977 ex.s. c 80: See notes following RCW 4.16.190.

APPENDIX 2

WAC 332-130-050
Survey map requirements.

The following requirements apply to land boundary survey maps and plans, records of surveys, plats, short plats, boundary line adjustments, and binding site plans required by law to be filed or recorded with the county.

(1) All such documents filed or recorded shall conform to the following:

(a) They shall display a county recording official's information block which shall be located along the bottom or right edge of the document unless there is a local requirement specifying this information in a different format. The county recording official's information block shall contain:

(i) The title block, which shall be on all sheets of maps, plats or plans, and shall identify the business name of the firm and/or land surveyor that performed the survey. For documents not requiring a surveyor's certificate and seal, the title block shall show the name and business address of the preparer and the date prepared. Every sheet of multiple sheets shall have a sheet identification number, such as "sheet 1 of 5";

(ii) The auditor's certificate, where applicable, which shall be on the first sheet of multiple sheets; however, the county recording official shall enter the appropriate volume and page and/or the auditor's file number on each sheet of multiple sheets;

(iii) The surveyor's certificate, where applicable, which shall be on the first sheet of multiple sheets and shall show the name, license number, original signature and seal of the land surveyor who had responsible charge of the survey portrayed, and the date the land surveyor approved the map or plat. Every sheet of multiple sheets shall have the seal and signature of the land surveyor and the date signed;

(iv) The following indexing information on the first sheet of multiple sheets:

(A) The section-township-range and quarter-quarter(s) of the section in which the surveyed parcel lies, except that if the parcel lies in a portion of the section officially identified by terminology other than aliquot parts, such as government lot, donation land claim, homestead entry survey, townsite, tract, and Indian or military reservation, then also identify that official subdivisional tract and call out the corresponding approximate quarter-quarter(s) based on projections of the aliquot parts. Where the section is incapable of being described by projected aliquot parts, such as the Port Angeles townsite, or elongated sections with excess tiers of government lots, then it is acceptable to provide only the official GLO designation. A graphic representation of the section divided into quarter-quarters may be used with the quarter-quarter(s) in which the surveyed parcel lies clearly marked;

(B) Additionally, if appropriate, the lot(s) and block(s) and the name and/or number of the filed or recorded subdivision plat or short plat with the related recording data;

(b) They shall contain:

(i) A north arrow;

(ii) The vertical datum when topography or elevations are shown;

(iii) The basis for bearings, angle relationships or azimuths shown. The description of the directional reference system, along with the method and location of obtaining it, shall be clearly given (such as "North by Polaris observation at the SE corner of section 6"; "Grid north from azimuth mark at station Kellogg"; "North by compass using twenty-one degrees variation"; "None"; or "Assumed bearing based on ..."). If the basis of direction differs from record title, that difference should be noted;

(iv) Bearings, angles, or azimuths in degrees, minutes and seconds;

(v) Distances in feet and decimals of feet;

(vi) Curve data showing the controlling elements.

(c) They shall show the scale for all portions of the map, plat, or plan provided that detail not drawn to scale shall be so identified. A graphic scale for the main body of the drawing, shown in feet, shall be included. The scale of the main body of the drawing and any enlargement detail shall be large enough to clearly portray all of the drafting detail, both on the original and reproductions;

(d) The document filed or recorded a ll copies required to be submitted with th d or recorded document shall, for legibility purposes:

(i) Have a uniform contrast suitable for scanning or microfilming.

(ii) Be without any form of cross-hatching, shading, or any other highlighting technique that to any degree diminishes the legibility of the drafting detail or text;

(iii) Contain dimensioning and lettering no smaller than 0.08 inches, vertically, and line widths not less than 0.008 inches (equivalent to pen tip 000). This provision does not apply to vicinity maps, land surveyors' seals and certificates.

(e) They shall not have any adhesive material affixed to the surface;

(f) For the intelligent interpretation of the various items shown, including the location of points, lines and areas, they shall:

(i) Reference record survey documents that identify different corner positions;

(ii) Show deed calls that are at variance with the measured distances and directions of the surveyed parcel;

(iii) Identify all corners used to control the survey whether they were calculated from a previous survey of record or found, established, or reestablished;

(iv) Give the physical description of any monuments shown, found, established or reestablished, including type, size, and date visited;

(v) Show the record land description of the parcel or boundary surveyed or a reference to an instrument of record;

(vi) Identify any ambiguities, hiatuses, and/or overlapping boundaries;

(vii) Give the location and identification of any visible physical appurtenances such as fences or structures which may indicate encroachment, lines of possession, or conflict of title.

(2) All signatures and writing shall be made with permanent black ink.

(3) The following criteria shall be adhered to when altering, amending, changing, or correcting survey information on previously filed or recorded maps, plats, or plans:

(a) Such documents filed or recorded shall comply with the applicable local requirements and/or the recording statute under which the original map, plat, or plan was filed or recorded;

(b) Alterations, amendments, changes, or corrections to a previously filed or recorded map, plat, or plan shall only be made by filing or recording a new document;

(c) All such documents filed or recorded shall contain the following information:

(i) A title or heading identifying the document as an alteration, amendment, change, or correction to a previously filed or recorded map, plat, or plan along with, when applicable, a cross-reference to the volume and page and auditor's file number of the altered document;

(ii) Indexing data as required by subsection (1)(a)(iv) of this section;

(iii) A prominent note itemizing the change(s) to the original document. Each item shall explicitly state what the change is and where the change is located on the original;

(d) The county recording official shall file, index, and cross-reference all such documents received in a manner sufficient to provide adequate notice of the existence of the new document to anyone researching the county records for survey information;

(e) The county recording official shall send to the department of natural resources, as per RCW 58.09.050(3), a legible copy of any document filed or recorded which alters, amends, changes, or corrects survey information on any document that has been previously filed or recorded pursuant to the Survey Recording Act.

(4) Survey maps, plats and plans filed with the county shall be an original that is legibly drawn in black ink on mylar and is suitable for producing legible prints through scanning, microfilming or other standard copying procedures. The following are allowable formats for the original that may be used in lieu of the format stipulated above:

(a) photo mylar with original signatures,

(b) any standard material as long as the format is compatible with the auditor's recording process and records storage system. Provided, that records of survey filed pursuant to chapter 58.09 RCW are subject to the restrictions stipulated in RCW 58.09.110(5),

(c) an electronic version of the original if the county has the capability to accept a digital signature issued by a licensed certification authority under chapter 19.34 RCW or a certification authority under the rules adopted by the Washington state board of registration for professional engineers and land surveyors, and can import electronic files into an imaging system. The electronic version shall be a standard raster file format acceptable to the county.

(5) The following checklist is the only checklist that may be used to determine the recordability of records of survey filed pursuant to chapter 58.09 RCW. There are other requirements to meet legal standards. This checklist also applies to maps filed pursuant to the other survey map recording statutes, but for these maps there may be additional sources for determining recordability.

CHECKLIST FOR SURVEY MAPS BEING RECORDED

(Adopted in WAC 332-130)

The following checklist applies to land boundary survey maps and plans, records of surveys, plats, short plats, boundary line adjustments, and binding site plans required by law to be filed or recorded with the county. There are other requirements to meet legal standards. Records of survey filed pursuant to chapter 58.09 RCW, that comply with this checklist, shall be recorded; no other checklist is authorized for determining their recordability.

ACCEPTABLE MEDIA:

- For counties required to permanently store the document filed, the only acceptable media are:

  [ ] Black ink on mylar or photo mylar
- For counties exempted from permanently storing the document filed, acceptable media are:

  [ ] Any standards material compatible with county processes; or, an electronic version of the original.
- [ ] All signatures must be original and, on hardcopy, made with permanent black ink.
- [ ] The media submitted for filing must not have any material on it that is affixed by adhesive.

LEGIBILITY:

- [ ] The documents submitted, including paper copies, must have a uniform contrast throughout the document.
- [ ] No information, on either the original or the copies, should be obscured or illegible due to cross-hatching, shading, or as a result of poor drafting technique such as lines drawn through text or improper pen size selection (letters or number filled in such that 3's, 6's or 8's are indistinguishable).
- [ ] Signatures and seals must be legible on the prints or the party placing the seal must be otherwise identified.
- [ ] Text must be 0.08 inches or larger; line widths shall not be less than 0.008 inches (vicinity maps, land surveyor's seals and certificates are excluded).

INDEXING:

- [ ] The recording officer's information block must be on the bottom or right edge of the map.

  [ ] A title block (shows the name of the preparer and is on each sheet of multiple sheets).

  [ ] An auditor's certificate (on the first sheet of multiple sheets, although Vol./Pg. and/or AF# must be entered by the recording officer on each sheet).

  [ ] A surveyor's certificate (on the first sheet of multiple sheets; seal and signature on multiple sheets).
- The map filed must provide the following indexing data:

[ ] S-T-R and the quarter-quarter(s) or approximate quarter-quarter(s) of the section in which the surveyed parcel lies,

[ ] Optional: A graphic representation of the section divided into quarter-quarters may be used with the quarter-quarter(s) in which the surveyed parcel lies clearly marked;

MISCELLANEOUS

- If the function of the document submitted is to change a previously filed record, it must also have:

  [ ] A title identifying it as a correction, amendment, alteration or change to a previously filed record,

  [ ] A note itemizing the changes.

- For records of survey:

  [ ] The sheet size must be 18" x 24"

  [ ] The margins must be 2" on the left and 1/2" for the others, when viewed in landscape orientation.

  [ ] In addition to the map being filed there must be two prints included in the submittal; except that, in counties using imaging systems fewer prints, as determined by the Auditor, may be allowed.

[Statutory Authority: RCW 58.24.040(1) and 58.09.110. 00-17-063 (Order 704), § 332-130-050, filed 8/9/00, effective 9/9/00. Statutory Authority: RCW 58.24.040(1). 89-11-028 (Order 561), § 332-130-050, filed 5/11/89; Order 275, § 332-130-050, filed 5/2/77.]

ERIKSON & ASSOCIATES LAW

January 22, 2013 - 11:01 AM

Transmittal Letter

Document Uploaded: 438976-Respondents' Brief~2.pdf

Case Name: Hynds v Schmidt

Court of Appeals Case Number: 43897-6

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondents'
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

Re-submitted as requested by CoA

Sender Name: Kris Eklove - Email: kris@eriksonlaw.com

A copy of this document has been emailed to the following addresses:

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